learned Chief Justice in that case, and with the conclusion reached by the court. The question, however, whether the language of the Act of 1867 is equivalent to that used in the Act of 1866, need not be discussed, because of the change of phraseology made by the Revised Statutes.

Nor is it necessary to inquire how far the case of *Insurance Co.* v. *Dunn*, 19 Wall. 214, could be regarded as an authority in favor of the plaintiff's contention had no such change in phraseology been made.

In view of the provisions of our statute with respect to reviews, and the amendment of the United States Constitution referred to, as now advised, I should hesitate before ordering a cause removed to the Circuit Court of the United States for review, in pursuance of any statute that might be passed by Congress, until such right of removal had been determined by the Supreme Court of the United States upon error to the judgment of this court.

CUSHING, C. J., concurred.

Exceptions overruled and petition denied.

United States District Court. Eastern District of Virginia.

HARMANSON, ASSIGNEE, ETC., *v.* WILSON.

Where interest is not expressly stipulated for in the contract, it is not an essential part thereof, and the state may prohibit its recovery without impairing the obligation of the contract.

In Virginia interest is only recoverable by virtue of statutes which make the allowance of it discretionary with the court and jury. Therefore a statute allowing an abatement of interest that accrued during the war, between citizens of the same state, is constitutional and valid.

Semble, the act would be valid in Virginia even in cases where interest was expressly contracted for.

THIS was a bill to subject certain real estate of the defendant, Wilson, to the payment of two notes, held against him by the assignee in bankruptcy of the Portsmouth Savings Fund Society, secured by deed of trust.

One of the notes was for $3450, dated February 4th 1862, which was given in renewal of other notes, which commenced before April 1861. The other note, given in like manner for

notes beginning before April 1861, was for $2990, and was dated on the 29th November 1870.

The defence was only to the claim for interest during the period of the late war.

James E. Heath, for plaintiff.—1. The defence relies on the Act of Virginia of 1872–3, ch. 353, p. 344; V. C. 1873, ch. 173, p. 1120, sect. 14. Interest is implied from the nature of the contract, which is commercial paper, and is as much part of the contract as if expressed on its face: *Page* v. *Newman*, 9 Barn. & Cres. 378; *Foster* v. *Weston*, 6 Bing. 799; *Colton* v. *Bragg*, 15 East 223; 1 H. & M. 211; *Wood* v. *Hickock*, 2 Wend. 501; *Robinson* v. *Bland*, 2 Burr. 1086; 3 Cow. 436.

Therefore the Act is unconstitutional as to this claim: *Planters' Bank* v. *Sharp*, 6 How. 301; *Ogden* v. *Saunders*, 12 Wheat. 213; *Green* v. *Biddle*, 8 Wheat 1; *McCracken* v. *Hayward*, 2 How. 608; *Sturges* v. *Crowningshield*, 4 Wheat. 122; *Fletcher* v. *Peck*, 6 Cranch 87; *Von Hoffman* v. *City of Quincy*, 4 Wall. 553; *White* v. *Hart*, 13 Wall. 646; *Taylor* v. *Stearns*, 18 Gratt. 244; *Bank of the Old Dominion* v. *McVeigh*, 20 Gratt. 457; *Homestead Cases*, 22 Gratt. 266.

2. The allowance of interest is matter of contract either express or implied. The statutes referred to as allowing interest from 37th Henry VIII. down are merely negative; they do not declare in what cases interest shall be taken. The law of Virginia is not different from that of England and other states in this respect.

Wilson and *Baker & Walke*, for defendant.

HUGHES, J.—I think that upon authority, as presented in the Virginia cases of *McCall* v. *Turner*, 1 Call 115; *Brewer* v. *Hastie*, 3 Call 21; *Ambler's Executors* v. *Macon et al.*, 4 Call 605; *Tucker* v. *Watson, McGill & Co.*, 6 Am. Law Reg. 220; and the series of Acts of Assembly by which this state has expressly and continuously, from the beginning, preserved to her juries a discretionary power over the subject of interest on money, we may assume the law of this Commonwealth, as between citizens thereof, to be, that interest during a period of war may be disallowed by a jury or a court without breach of contract. The legislature of Virginia, by a long series of acts, reaching down, in conjunction with Acts of Parliament, from the time when, by

express statute, the taking of interest on money at such rate as the statute expressly named was declared not to be usury, and was converted from a crime into a statutory privilege, has reserved to itself the power to say first, through a jury, under what circumstances interest may be taken at all; and next, what percentage of interest shall be allowed. The statutes, and the decisions of her highest courts and ablest judges in the cases I have named, seem to me to settle the law of the subject for this Commonwealth. The law may not be precisely the same in other states of the Union, or in England. The weight of authority elsewhere is probably in favor of the exaction of war interest; and the decisions of the Supreme Court of the United States in cases between other litigants than citizens of Virginia probably incline in the same direction; but a Federal court adjudicating between citizens of a state of the Union in cases where the *lex loci contractus* governs, is bound to follow the law of that state as interpreted by its courts of highest resort; and therefore I feel bound in this case to disregard contrary decisions on this subject which may have been made by the courts of other states, or by the Federal courts in adjudicating between citizens of other states, and uphold the Virginia statute, sect. 14, chapter 173, of the Code of 1873. If I were to deny the power of the court or of a jury to disallow war interest in Virginia, I should have not only to nullify an Act of Assembly which all courts of the state are now administering, but to disregard solemn decisions of its Supreme Court of Appeals, never overruled, and rendered at a time when that court commanded, probably more than at any other, the highest consideration among lawyers and jurists. The only ground upon which opposition is or can be made to this provision of the Code, leaving it in the discretion of court and jury to allow or not allow interest during the period of the late war, is, that it impairs the obligation of contracts, and thus violates that clause of the national Constitution which prohibits the states from passing laws having such effect.

It is contended, however, in reply, that interest is not in all cases an obligation of contract, in the meaning of the clause of the national Constitution referred to. It is true that it is sometimes expressly provided for in the bond, promissory note, or other writing in which parties unite. In such cases, of course, the payment of it is an obligation of contract; and but for the fact that the taking of interest at all is wholly of legislative permission, and

that that provision has been in Virginia continually coupled with a legislative reservation to juries of discretion over it, there could be no denial of the fact that the obligation was protected by the provision of the national Constitution which has been named.

But in the large majority of cases interest is not payable by express contract. In a multitude of them the obligation to pay it is only implied. Where it is not given by express contract, and the obligation to pay it is not implied by the courts, there is a large class of cases in which it is given as damages for the non-payment of money when due. There are, therefore (using the terms of the civil law), three modes in which interest may become due; by *obligation ex contractu*, by *obligation quasi ex contractu*, and by *obligation ex delicto;* that is to say, by contract, by implied contract, and by tort. It is with reason contended that the prohibition of the National Constitution does not apply to the two latter classes of contract, but only to the first. There is reason for prohibiting the states from impairing express contracts entered into in solemn form; while great mischief and abuse may result from wholly annihilating their power over the multitudinous class of implied contracts, which are inferences of the courts, often controvening the intention of parties. The clause of that instrument containing the prohibition is in these words: "No state shall * * * * pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Each of the other phrases in the context is used in its strictly technical sense. "Bill of attainder" has a well-defined judicial meaning, and the courts will not give it a constructive meaning other than or beyond its technical one. So the phrase *ex post facto* law is held to embrace only laws relating to crimes, and will not be allowed by the courts to embrace retrospective laws affecting civil rights. Likewise, it is contended that the phrase *obligation of contracts* should be strictly construed; that is to say, should be treated technically; and should not be interpreted to embrace other contracts than those known in the classification of the civil law as *obligations ex contractu*, or express contracts. It is a historical fact that the prohibition was inserted in the Constitution on the motion of an eminent civil lawyer, educated in Scotland, Mr. WILSON, afterwards justice of the Supreme Court of the United States. There can be no doubt that the mover of the provision intended it to have only its technical signification; and it is with reason contended that the

phrase should be construed strictly, and not be latitudinously extended to apply to *obligations quasi ex contractu* (implied contracts), or to *obligations ex delicto*, the obligation to pay damages. What possible reason can exist for depriving the states of power over the latter classes of obligations?

Neither of the notes which are the subject of the petition in this case gives interest in terms. It is due upon each of them only by implication. It is due for the *forbearance* of money. It is due by *obligation quasi ex contractu.* It may with reason be contended, therefore, that this is not one of the class of contracts falling within that prohibition of the National Constitution which would render the Act of the Virginia Assembly void in regard to express contracts.

But however this phrase of the National Constitution may be interpreted touching the special subject of interest in other states, and in suits between citizens of other states, the question in Virginia stands upon a special basis, to some extent peculiar to this Commonwealth. Here the state of the law relating to interest is as follows: By common law, the taking of interest was usury, and a punishable offence. This being the normal condition of the law for a long time, a statute finally was passed in England giving the creditor permission to charge a certain limited percentage of interest; the taking of a greater percentage being still left as a punishable offence; and in Virginia this statutory permission has been continued from time to time down to the present day, always coupled with a legislative provision that the allowance of even the rate of interest permitted to be taken by law should be within the discretion of juries.

Therefore this legislative provision has entered into and become a part of every contract of interest, express or implied, which has been made during its existence upon the statute book. Being a part of the contract in every case, the clause of the National Constitution prohibiting the passage of laws impairing the obligation of contracts, does not apply to this law of Virginia.

The condition of the law in Virginia, on this subject, is precisely the same as it is on the subject of corporate charters. When the legislature grants a charter, but for a general law on the subject it would have no power to alter or amend the charter until the term for which it had been granted had expired. This is so, because of the decision of the Supreme Court in the *Dartmouth*

College Case, which declared charters to be contracts; and that laws altering charters had the effect of impairing the obligation of contracts, and therefore contravened the clause of the National Constitution forbidding such laws.

The consequence has been, that most or all of the states—Virginia among them—have expressly reserved the right to alter or amend every charter that is granted. In Virginia this reservation is not repeated in each act of charter, but is a standing provision in the form of a general law of corporations; so that now, by virtue of that general law, the legislature of the state alters and amends every charter at its pleasure; and these amendatory laws do not contravene the clause of the National Constitution under consideration.

Precisely the same is the case with reference to the disallowance of interest. From a period long anterior to the adoption of the National Constitution, has the General Assembly of this state reserved to itself the power of intrusting the allowance of interest to the discretion of juries. This express reservation of power has entered into every contract between her citizens that has been made within a hundred years, and the Act of Assembly of 1872–3, ch. 353, p. 344, Code of 1873, sect. 14, ch. 173, p. 1120, directing the courts and juries to exercise that discretion, does not, in my opinion, in any degree, impair the obligation of contracts within the inhibition of the National Constitution.

As to the equities of the case, alluded to by both counsel in the conclusion of their briefs, I think there are, in general, very strong equities against the allowance of war interest. In the great majority of cases in which the interest for that period is unpaid, the creditors refused to accept it, at the time it fell due, in the currency then in circulation. They preferred to take the chances of receiving gold, or its equivalent, after the war should be over, and of the enactment of such legislation as the state has actually resorted to. The permanent and fixed legislative policy of the state had been and was to reserve to her juries the discretion of allowing or disallowing all interest; and these creditors certainly ought to have contemplated the very probable contingency of the legislature's directing the exercise of this discretion as to interest falling due during the war, when all the resources of the state and her citizens were devoted to the prosecution of their side of the contest. They had knowledge of the legislative policy alluded to,

and had notice of the probability that war interest would be disallowed as described. If, with such notice, they chose to refuse interest, as it became due, or to forbear the collection of it, they cannot now complain of the harshness of the law by which it is disallowed.

The assignee in bankruptcy has made his claim to war interest in this case by bill in chancery, making the maker of the notes, the trustee in the deeds of trust securing their payment, and the endorsers of the notes on which the interest is claimed, parties defendant. A decree will be given in accordance with the prayer of the bill, except that the defendant, Wilson, will be required to pay the amount which shall be found due upon the notes, without computing interest for the period between the 17th April 1861, and the 10th April 1865.

Supreme Court of Michigan.

COOK ET AL. *v.* ROGERS, GARNISHEE OF BOW.

An assignment by a debtor of all his property in trust for the payment of his debts, is an exercise of ownership by virtue of the common law and is valid, irrespective of any insolvent laws.

Hence the fact that the passage of a National Bankrupt Act has *ipso facto* suspended the insolvent laws of the state, does not make such an assignment void, so that a creditor can by a proceeding in the state court attach the property in the hands of the assignee.

Whether such an assignment is an act of bankruptcy which will give the Federal courts jurisdiction to set it aside and assume the administration of the estate under the Bankrupt Law, is a different question, which can only be raised in the Bankruptcy Court. Until action by the latter, the state court will sustain the validity of the assignment.

ON writ of error. On November 18th 1873, Albert Bow made a voluntary assignment of his property to Eli B. Rogers, for the equal benefit of all his creditors, no preferences being declared. Rogers accepted the trust and took possession.

A few days later, the plaintiffs commenced a suit against Bow in the Circuit Court, to recover a debt of some three hundred dollars they held against him.

On the institution of this suit they at once proceeded by garnishee process in the same court against Rogers. And being summoned to appear and make disclosure on such process, he appeared on the 16th of December 1873 and made a general denial. The plaintiff then filed a series of special interrogatories to be